

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

IN RE: PET FOOD PRODUCTS LIABILITY
LITIGATION

Hon. Noel L. Hillman

MDL Docket No. 1850

ALL CASES

**AGREEMENT REGARDING THE PRESERVATION AND DESTRUCTION OF
WORK-IN-PROGRESS**

The Parties hereby enter into the following agreement (the "Agreement") with respect to the preservation and destruction of Del Monte Foods Company's work-in-progress:

1. DEFINITIONS

A. **Party or Parties:** "Party" or "Parties" means Del Monte Foods Company ("Del Monte") as well as all named plaintiffs in This Litigation represented by the undersigned plaintiffs counsel (collectively the "Plaintiffs"). It is intended that all plaintiffs in This Litigation shall benefit from the provisions of this Agreement. It is acknowledged that all plaintiffs and defendants in This Litigation are not signatories to this Agreement and this Agreement specifically contemplates that no action will be taken unless and until ordered by the Court.

B. **The Storing Defendant:** "The Storing Defendant" means Del Monte, which currently possesses work-in-progress.

C. **This Litigation:** "This Litigation" means the civil actions consolidated in MDL Docket No. 1850, pending in the United States District Court for the District of New Jersey and collectively captioned *In re: Pet Food Products Liability Litigation*, Civil No. 07-2867 (NLH/AMD) as of the date of this Agreement.

D. **Work-In-Progress**: “Work-In-Progress” means a mixture of dry ingredients, including Raw Wheat Gluten, pulled off the production line at the time of Del Monte's recalls, which is being stored in large totes.

E. **Recipe**: “Recipe” means the recipe of pet food being produced at the time the Work-In-Progress was pulled from the production line.

F. **Sampling Plan**: “Sampling Plan” means the plan set forth in the Declaration of Dr. George P. McCabe In Support of Defendants’ Unopposed Motion to Limit the Retention of Organized Recalled Product, Raw Wheat Gluten and Unorganized Inventory (the “McCabe Declaration”) in which Dr. McCabe identifies the number of samples from each Recipe which should be preserved in order for a statistically representative sample of the Work-In-Progress to exist to satisfy the research and testing needs of the Plaintiffs or other interested parties, including a determination of the presence and range of melamine or cyanuric acid (or other toxin), if any, contained in the Work-In-Progress. Dr. McCabe, who was engaged by The Storing Defendant to develop the Sampling Plan and the Retrieval Plan, is Professor of Statistics and Associate Dean for Academic Affairs, College of Science, at Purdue University.

G. **Retrieval Plan**: “Retrieval Plan” means the general plan included in the McCabe Declaration in which Dr. McCabe identifies the method by which The Storing Defendant will retrieve samples pursuant to the Sampling Plan. The Parties and their experts have not reached consensus on the specific details of the Retrieval Plan, including the number of totes of Work-In-Progress from which the samples will be retrieved.

2. AGREED UPON FACTS

A. **Whereas** the Parties agree that The Storing Defendant has in its possession Work-In-Progress.

B. **Whereas** The Storing Defendant is storing over 42,000 pounds of Work-In-Progress.

C. **Whereas** The Storing Defendant has advised Plaintiffs that the continued storage of large quantities of the Work-In-Progress gives rise to health and safety concerns which has prompted the Food and Drug Administration to send a letter to The Storing Defendant requesting the expeditious destruction of its Work-In-Progress.

D. **Whereas** the Parties agree that the quantity of Work-In-Progress The Storing Defendant has in its possession exceeds the quantity that would be used for the Parties' and any other interested persons' research and testing needs, including a determination of the presence and range of melamine and/or cyanuric acid (or other toxin), if any, contained in the Work-In-Progress.

E. **Whereas** the Sampling Plan calls for, among other things, the preservation of 500 samples of Work-In-Progress per Recipe in the possession of The Storing Defendant.

F. **Whereas** The Storing Defendant provided to Plaintiffs its inventory of Work-In-Progress per Recipe.

G. **Whereas** Plaintiffs engaged Nicholas P. Jewell, Ph.D., Vice Provost, Academic Personnel, Office of the President, University of California and Professor of Biostatistics & Statistics, School of Public Health & Department of Statistics, University of California at Berkeley, to review on behalf of Plaintiffs The Storing Defendant's Recipe inventories and analyze the Sampling Plan and Retrieval Plan.

H. **Whereas** following Dr. Jewell's review of the Sampling Plan and Plaintiffs' deposition of George McCabe, Ph.D., in connection with Del Monte's Emergency Motion to Limit the Retention of Recalled Pet Treats and Food, Raw Wheat Gluten and Mixtures Containing Recalled Wheat Gluten ("Del Monte Motion") and all other information voluntarily made available by The Storing Defendant, Plaintiffs agree not to object to the Sampling Plan providing that 500 samples per Recipe from each Recipe in The Storing Defendant's possession are preserved.

I. **Whereas** following Dr. Jewell's review of the Sampling Plan and Plaintiffs' deposition of George McCabe, Ph.D., in connection with the Del Monte Motion and all other information voluntarily made available by The Storing Defendant, Plaintiffs agree not to object to the Retrieval Plan, subject to the Parties and their experts reaching consensus on the specific details of the Retrieval Plan, including the number of totes of Work-In-Progress from which the samples will be retrieved. The Storing Defendant and Plaintiffs reserve their right to move the Court for approval of a Retrieval Plan in the event that the Parties and their experts are not able to reach consensus in a timely manner.

J. **Whereas** although Plaintiffs have not yet commenced formal discovery on this matter as a result of the stay in This Litigation, Plaintiffs are entering into this Agreement on an informed basis based on documents and information (and the contents thereof) provided by The Storing Defendant and requested by Plaintiffs from The Storing Defendant, including but not limited to Plaintiffs' inspection of, and opportunity to inspect, The Storing Defendant's warehouses; Plaintiffs' deposition of Dr. McCabe; the representations made by The Storing Defendant; and Dr. Jewell's review and analysis of such documents, information, deposition testimony and representations.

3. AGREEMENT

In light of the above, and subject to approval by the Court, the Parties agree as follows

A. The Storing Defendant will preserve 500 samples per Recipe to be selected pursuant to the Retrieval Plan. Specifically, the samples will be randomly selected from the totes containing each Recipe.

B. The Parties agree that the size of each sample will be no less than 2 grams of Work-In-Progress.

C. The Parties agree that the Sampling Plan and the Retrieval Plan provide a sufficient statistically representative sample of the Work-In-Progress and will satisfy the Parties and other interested persons' research and testing needs, including a determination of the range of melamine and/or cyanuric acid (or other toxin), if any, contained in the Work-In-Progress or any other issue in this Litigation. The Parties agree that no Work-In-Progress may be destroyed until the number of totes of Work-In-Progress from which the samples will be taken is agreed to or the Court enters an order allowing such destruction.

D. The Storing Defendant is filing a motion with the Court requesting Court approval to destroy any and all of the remaining Work-In-Progress not preserved pursuant to Section A hereto, and Plaintiffs do not oppose the motion.

E. Plaintiffs reserve all rights to raise claims for spoliation of evidence in This Litigation and to seek factual inferences related to the storage of the Work-In-Progress. The Storing Defendant reserves all rights to raise any and all objections, responses or defenses to any such spoliation of evidence claims or factual inferences that Plaintiffs might advance.

F. No Party may use the Sampling Plan, Retrieval Plan or the absence and/or destruction of any Work-In-Progress in any way as against any other Party. Nothing in this

Agreement, however, shall preclude a Party from creating assumptions regarding the characteristics of the Work-In-Progress destroyed by The Storing Defendant based upon the characteristics of the Work-In-Progress preserved by The Storing Defendant pursuant to the Sampling Plan. Similarly, all Parties reserve the right to object to other Parties' attempt to introduce such assumptions at the trial of This Litigation or otherwise.

G. This Agreement is limited to the preservation and destruction of Work-In-Progress and in no way impacts the Parties' on-going negotiations regarding the Retrieval Plan, the destruction of unorganized inventory, and the preservation and destruction of organized recalled pet food or raw wheat gluten. In addition, the Parties reserve all rights to file any motions and make any other submissions with the Court regarding (1) the Retrieval Plan and (2) the destruction of unorganized inventory, and the preservation and destruction of organized recalled pet food or raw wheat gluten.

H. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together will constitute one and the same instrument.

///SIGNATURES ON FOLLOWING PAGE///

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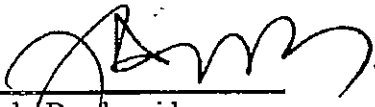
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